

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs August 4, 2009

**MARCUS TERRY, aka MARCUS BENSON, aka TORIAN BENSON  
v. TONY PARKER, WARDEN**

**Appeal from the Circuit Court for Lake County  
No. 09-CR-9271 Lee Moore, Judge**

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**No. W2009-00710-CCA-R3-HC - Filed September 3, 2009**

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The petitioner, Marcus Terry, filed a petition for writ of habeas corpus, claiming that his 1997 convictions for vehicular homicide are void because, in his view, the jury instructions were erroneous and he should not have been classified as a career offender. The trial court determined that these claims were not appropriate for habeas corpus relief and denied the petition. Following our review, we affirm the denial pursuant to Rule 20, Rules of the Court of Criminal Appeals.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed Pursuant  
to Rule 20, Rules of the Court of Criminal Appeals**

ALAN E. GLENN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J.C. McLIN, JJ., joined.

Marcus Terry, Tiptonville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; and Rachel E. Willis, Assistant Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

The petitioner's lengthy history of criminal convictions and filing of post-conviction complaints was set out in Marcus Terry aka Marcus Benson aka Torian Benson v. Tommy Mills, Warden, No. W2006-01802-CCA-R3-HC, 2007 WL 4146244 (Tenn. Crim. App. Nov. 20, 2007):

On May 11, 1986, the Petitioner, Torian Benson, pled guilty in Shelby County Criminal Court to four counts of larceny and six counts of robbery. For these offenses, he received a sentence of three years imprisonment for each larceny count and five years for each robbery count. See Benson v. State, 153 S.W.3d 27, 29 (Tenn. 2004). All sentences were ordered to be served concurrently, resulting in an

effective sentence of five years. On March 6, 1989, the Petitioner entered guilty pleas to two counts of larceny and one count of aggravated assault. He was sentenced to three years for each count, all to be served concurrently, for an effective total sentence of three years.

On January 4, 1993, the Petitioner entered a guilty plea to one count of theft of property over \$10,000 and was sentenced to four years imprisonment. On April 23, 1993, the Petitioner pled guilty to unlawful possession of a controlled substance with intent to sell and was sentenced to a term of eight years. On September 3, 1993, the Petitioner pled guilty to two counts of possession of a controlled substance and received an eight-year sentence for one count and a four-year sentence for the other. All of the 1993 convictions were ordered to be served concurrently.

On April 17, 1997, the Petitioner was found guilty of two counts of vehicular homicide and sentenced to a term of fifteen years for each count. Based upon the petitioner's prior convictions, the trial court found the Petitioner to be a "career offender." Under the sentencing guidelines, this designation required the court to impose the maximum sentence for felony offenses, which in the case of vehicular homicide was fifteen years. The trial court ordered both fifteen-year sentences to be served consecutively, not only with each other but also with another four-year sentence. Therefore, the Petitioner is currently serving an effective sentence of thirty-four years imprisonment for these latest crimes. *Id.* The Petitioner is currently confined at Northwest Correctional Complex in Tiptonville, Tennessee.

In May 2006, the Petitioner filed an application for the issuance of the writ of habeas corpus in the Shelby County Criminal Court. The petition challenged the Petitioner's convictions and sentences for his April 1997 convictions for vehicular homicide. Specifically, the Petitioner claimed that "[t]he two consecutive range III fifteen year sentences currently being served by Petitioner are illegally enhanced by reliance upon void prior convictions, in violation of Petitioner's right to due process of law granted him by article I, § 8 of the Tennessee Constitution." He argued that:

The reality here is that Petitioner is being illegally restrained of liberty by virtue of his prior convictions because without using such prior convictions as enhancements, Petitioner's current sentence, two consecutive Range III fifteen year sentences at 60%, would be reduced, at most, to two consecutive range I sentences at 30%. Under his current sentence, Petitioner is not eligible for release consideration until he has served 60% of a thirty year sentence, 18 calendar years.

If the prior convictions are illegal and can not be used to enhance Petitioner's current sentence, Petitioner becomes eligible for release consideration after serving 30% of a twelve year sentence, 3.6 years.

. . . But for these prior convictions, Petitioner, who has already served eleven (11) calendar years less sentence credits, would have already served the 3.6 years required under the range I sentencing scheme.

Id. at \*\*1-2.

The petition which is the basis for this appeal claims that the petitioner's 1997 convictions for vehicular homicide are void because the jury was erroneously instructed and that, as he has argued in previous petitions, for various reasons his 1986, 1989, and 1993 convictions are void.

### ANALYSIS

The arguments presented by the petitioner on appeal are that the trial court, in his 1997 trial for vehicular homicide, erroneously instructed the jury as to punishment; that habeas corpus relief is available for his sentences which he has completed; and that his 1997 sentences for vehicular homicide are void because they were enhanced based upon void prior convictions.

On March 12, 2009, the trial court entered its order denying the petition for writ of habeas corpus:

On February 19, 2009, petitioner filed "Petition For The Issuance Of A Writ Of Habeas Corpus." He alleges that he is being confined at the Northwest Correctional Complex in Lake County, Tennessee.

Petitioner has filed numerous petitions for habeas corpus relief previously. He states in the present petition that he has filed three prior petitions for habeas corpus relief in the Lake County, Tennessee, Circuit Court, and one petition in Shelby County, all challenging his 1986 convictions. He states that in May of 1986, he entered a plea of guilty to four counts of larceny and six counts of robbery and was sentenced to three years for each count of larceny and five years for each count of robbery. He states that on March 6, 1989, he pl[e]d guilty to two counts of larceny and one count of aggravated assault. He was sentenced to three years on each count. On January 4, 1993, he pl[e]d guilty to one count of theft of property over \$10,000, and was sentenced to four years. He also states that on April 23, 1993, he entered a plea of guilty to unlawful possession of a controlled substance with intent to s[ell] and was sentenced to eight years. He states further that on September 3, 1993, he pl[e]d guilty to two counts of possession of a controlled substance and received an eight year sentence for one count and a three year sentence for the other.

Petitioner states further that in 1995, he was found guilty on two counts of vehicular homicide in Shelby County, Tennessee. He states that he was sentenced as a Career Offender and required to serve fifteen (15) years at sixty percent (60%)

on each sentence with the sentences to run consecutively. He states the vehicular homicide is a Class C felony. He alleges that the Court acted illegally in sentencing him as a Range III offender. He states that he was sentenced as a Career Offender and indicates that the Court indicated that he would receive the maximum sentence within the applicable Range III. He also alleges that the jury was instructed as to range of punishment incorrectly.

He also alleges that the Range III sentence of fifteen (15) years is illegal and void and that the sentencing [c]ourt acted without jurisdiction to enhance the sentences on the basis of prior convictions.

The only new allegation that the petitioner makes in his petition for [habeas corpus] relief is that there was a jury instruction on range of punishment that was allegedly incorrect. This issue is an issue for direct appeal and should have been pursued through a motion for new trial and on a direct appeal. There are no other new allegations. The petitioner continues to file petition after petition making basically the same allegations. It should be noted that the judgment forms filed by the petitioner in this case and previous cases showed that the petitioner has to have been convicted as a career offender and not actually a Range III offender. The felonies complained of are Class C felonies. The sentence for these charges as a career offender would be fifteen (15) years at sixty percent (60%). Again, as previously stated in other orders filed in this case, there does not appear to be any violation of the Blakely case and the Apprendi case. The sentences are not void nor have they expired. This petition is, therefore, denied.

The determination of whether to grant habeas corpus relief is a question of law. See Hickman v. State, 153 S.W.3d 16, 19 (Tenn. 2004). The Tennessee Constitution guarantees a convicted criminal defendant the right to seek habeas corpus relief. See Tenn. Const. art. I, § 15. However, the grounds upon which habeas corpus relief will be granted are very narrow. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999). A petition for habeas corpus relief may only be granted when the judgment is shown to be void, rather than merely voidable. Id. A judgment is void only when it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered that the convicting court was without jurisdiction or authority to sentence a defendant or that a defendant's sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). On the other hand, a voidable judgment or sentence is one which is facially valid and which requires evidence beyond the face of the judgment or the record of the proceedings to establish its validity. Taylor, 995 S.W.2d at 83.

A petitioner bears the burden of establishing a void judgment or illegal confinement by a preponderance of the evidence. Wyatt v. State, 24 S.W.3d 319, 322 (Tenn. 2000). Furthermore, it is permissible for a court to summarily dismiss a habeas corpus petition, without the appointment of counsel and without an evidentiary hearing, if there is nothing on the face of the record or judgment to indicate that the convictions or sentences addressed therein are void. Passarella v. State,

891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), superceded by statute as stated in State v. Steven S. Newman, No. 02C01-9707-CC-00266, 1998 WL 104492, at \*1 n.2 (Tenn. Crim. App. Mar. 11, 1998).

As we will explain, we agree with the State's arguments that the dismissal by the trial court should be affirmed.

First, as to the dismissal of the petitioner's argument that his 1997 vehicular homicide convictions are void because the jury received erroneous instructions, it is clear that habeas corpus relief is not available for such a claim. See Bobby A. Davis v. Howard Carlton, Warden, No. E2007-01279-CCA-R3-HC, 2008 WL 299067, at\*4 (Tenn. Crim. App. Feb. 4, 2008) ("This court has repeatedly found that erroneous jury instructions do not form the basis for habeas corpus relief."), perm. to appeal denied (Tenn. Apr. 28, 2008). The petitioner's couching this claim as a constitutional violation does not change the fact that such a claim may be pursued only on direct appeal or by a timely petition for post-conviction relief. Thus, the record supports the denial of the trial court for relief as to this claim.

The petitioner's second and third claims on appeal are based upon the premise that the decision of our supreme court in Hickman v. State, 153 S.W.3d 16 (Tenn. 2004), does not bar habeas corpus relief when a sentence currently being served was enhanced by completed illegal, in his view, sentences. However, this court explained in Robert L. Moore v. Glenn Turner, Warden, No. W2005-01995-CCA-R3-HC, 2006 WL 473725 (Tenn. Crim. App. Feb. 28, 2006), why offender classification, as to a sentence currently being served but affected by completed and allegedly illegal sentences, could not be the basis of habeas corpus relief:

Our supreme court has explained that offender classification and release eligibility are non-jurisdictional. McConnell v. State, 12 S.W.3d 795, 798 (Tenn. 2000). Therefore, the petitioner's second issue relating to the propriety of his classification as a career offender would at most render his thirty-year sentence voidable, not void. Jubal Carson v. David Mills, No. W2005-00745-CCA-R3-HC, 2006 WL 16306, at \*5 (Tenn. Crim. App. at Jackson, Jan. 4, 2006). As such, this issue is not properly the subject of a habeas corpus petition. See Tony Willis v. Tony Parker, No. W2004-02063-CCA-R3-HC, 2005 WL 1996637, at \*3 (Tenn. Crim. App. at Jackson, Aug. 18, 2005), perm. to appeal denied, (Tenn. 2006).

Id. at \*3.

Thus, the record supports the trial court's denying relief as to these claims as well.

## **CONCLUSION**

When an opinion would have no precedential value, the Court of Criminal Appeals may affirm the judgment or action of the trial court by memorandum opinion when the judgment is rendered or the action taken in a proceeding without a jury and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the finding of the trial judge. See Tenn. Ct. Crim. App. R. 20. We conclude that this case satisfies the criteria of Rule 20. Accordingly, the judgment of the trial court is affirmed in accordance with Rule 20, Rules of the Court of Criminal Appeals.

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ALAN E. GLENN, JUDGE